In the High Court of Judicature at Madras

Dated: 09-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.184 OF 1997

Mohideen @ Akbar ..Appellant/Plaintiff.

vs

Sowbagyam Ammal ..Respondent/3rd Defendant.
[Defendants 1 and 2 have been given up
as in AS]

Second appeal has been filed against the judgment and decree dated 21.03.1995 of the Subordinate Judge, Villupuram, made in A.S.No.244/1994, reversing the judgment and decree dated 27.03.1992 made in O.S.No.596/87 on the file of the Court of Additional District Munsif, Kallakurichi.

For Appellant : Mr.V.Radhakrishnan

For Respondent : Mr.R.Mohan

JUDGMENT

This appeal has been preferred against the decree and judgment in A.S.No.244/1994 preferred by the plaintiff, who has filed O.S.No.587/1996 on the file of the Court of Additional District Munsif, Kallakurichi for partition of plaintiff's one half share in the plaint schedule property and also for past and future mesne profits. The learned Additional District Munsif, has decreed the suit in respect of plaint schedule item No.1. The question of mesne profits was relegated to a separate proceedings under Order 20 Rule 18 or C.P.C. On appeal the first appellate Court in A.S.No.244/1994 has allowed the appeal setting aside the decree and judgment in O.S.No.596/1987 on the file of the Additional District Munsif, Kallakurichi, thereby dismissing the suit in toto. Hence, the present second appeal before this Court by the plaintiff.

2. The facts relevant for the purpose of deciding this second appeal as narrated in the plaint are as follows:-

The plaintiff and the first defendant are brothers. The plaint schedule property originally belonged to the plaintiff's paternal grand father Immam Sahib, who had executed a settlement deed in favour of the plaintiff and the first defendant on 29.08.1969. At the time of the

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execution of the above said settlement deed, the plaintiff was a minor. Hence, the plaintiff's mother was appointed as a guardian, who had taken possession of the suit property in lieu of the above said settlement deed. As per the settlement deed, the first defendant and the plaintiff are each entitled to one half share in the plaint schedule property. Without any right or title in respect of the suit property the mother of the plaintiff had executed a sale deed in respect of plaint item No.1 property in favour of the second defendant on 29.1.1973. The plaintiff reliably understand that his mother had executed another sale deed dated 9.5.1973 in respect of item No.2 infavour of the 3rd defendant. The plaintiff's father is still alive with good health. Hence, the mother of the plaintiff will not be a legal guardian in respect of the suit properties. Hence, the sale deed executed by the mother in respect of the suit property are void and will not bind neither the plaintiff nor the first defendant. The plaintiff need not set aside those sale deeds. The plaintiff was born in June 1968. Excluding the plaintiff, the first defendant is enjoying the suit property along with D2 & D3 inspite of the repeated demand from June 1986 by the plaintiff to partition the property, the defendants refused to do so. The plaintiff is entitled to one half share in the plaint schedule properties. The first defendant is entitled to the remaining one half share. The plaintiff is entitled to get the amount not lessthan Rs.600/- towards mesne profits per year. The second defendant is liable to pay Rs.100/- towards mesne profits per year to the plaintiff. The plaintiff is also entitled to the future mesne profits in the above line. Even though Defendants 2 & 3 are in possession of the plaint schedule property for more than 12 years, since the plaintiff has filed the suit before attaining the age of 21 years, the suit is not barred by limitation. Hence, the suit.

3. The defendant 1 & 2 remind ex-parte. The third defendant in his written statement would state that the sale deed executed by the plaintiff's mother Jamilabi in favour of this defendant on 9.5.1973 is valid document and not a voidable document as alleged in the plaint. It is only a voidable transaction and as the plaintiff has not prayed for setting aside the sale deed, the suit as framed is not maintainable. The plaintiff is aged more than 21 on the date of presentation of the plaint and so the suit is also barred by limitation. The allegation in the plaint that the plaintiff was born in June 1968 is not true. As this defendant is in possession of suit item 2 from 1973, this defendant has acquired title by prescription to suit item 2. This defendant has purchased suit item 2 from Jamilabi under a registered sale deed dated 9.5.1973 for valuable consideration of Rs.5,000/- for discharge of antecedent debts, family expenses and for benefit of the plaintiff's family. The recitals in the sale deed may be treated as part of his written statement. The said sale deed is true, valid and fully supported by consideration and it is binding upon the plaintiff. In view of the prior proceedings, in O.S.No.605/1973 which has been affirmed by Sub-Court, Cuddalore in O.S.NO.168/1975, the present suit is barred by resjudicata and the plaintiff cannot be heard to say that the sale deed in

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favour of this defendant is void. Mother Jamilabi, as a settlee was competent to execute the sale deed on behalf of the then minor plaintiff. This defendant has effected improvements to the suit property spending more than Rs.10,000/- and so the plaintiff has come forward with this suit to gain unjust enrichment. Further the sale deed has been executed toward the discharge of debts which are binding upon the plaintiff. Therefore the plaintiff cannot merely sue for possession of his half share in the suit properties when the prior debts are binding upon the plaintiff. The suit item No.2 will not yield Rs.500/- per annum as alleged in the plaint. There will be a net yield of only Rs.250/- per annum. The plaintiff is not entitled to any mesne profits from this defendant. This defendant denies all other allegations made in the plaint. Therefore this defendant prays that the suit may be dismissed with costs.

4. On the above pleadings the learned trial Judge framed nine issues. The plaintiff has examined himself as P.W.1 and Ex.A.1 & 2 were marked on the side of the plaintiff. On the side of the defendants, husband of the 3rd defendant was examined as D.W.1 and Ex.B.1 to Ex.B.4 were marked. After going through the available evidence both oral and documentary, the learned trial Judge has decreed the suit for partition in respect of Item No.2 in the plaint schedule and also passed an order of past mesne profits and relegating the future mesne profit to a separate proceedings under Order 20 Rule 18 of C.P.C , and dismissed the suit in respect of the plaint Item No.1. Aggrieved by the findings of the trial Court, the plaintiff preferred an appeal before the Subordinate Judge, Virudachallam in A.S.No.244/94, who has set aside the trial court's judgment and dismissed the suit in toto. Hence, the second appeal before this Court.

5.The substantial questions of law involved in this second appeal are as follows:

a) Whether the lower appellate Court is right in Law holding that the sale deed executed by the plaintiff's mother as guardian when the plaintiff was minor, in favour of the 3rd defendant is a voidable transaction?

b) Under the Mahomedan Law, the mother, not being a legal guardian, whether she has power to alienate the minor son's property, and Ex.B.1, the sale deed, executed by the mother of the plaintiff/appellant is not a void transaction?

c) Whether the lower appellate Court is right in Law holding that the sale deed Ex.B.1 is a voidable transaction?

d) Whether the plaintiff/appellant can avoid the sale deed Ex.B.1 by ignoring the same and whether the suit for partition, without setting aside the sale transaction Ex.B.1 is barred by limitation?

6.The point:-

6(i) The plaintiff Mohideen @ Akbar by way of this suit attacks Ex.B.1-sale deed on the ground that the vendor under Ex.B.1-sale deed viz. his mother is not competent to execute the sale deed as the guardian of

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the plaintiff. The learned counsel appearing for the appellant would contend that the plaintiff is a muslim by religion who is covered under the provisions of Mahomedan Law. The learned counsel for the appellant would contend that as per Section 359 of the Mahomedan Law the mother is not a legal guardian for a minor in respect of the property of the minor and that Ex.B.1-sale deed executed by the mother of the plaintiff while he was a minor in respect of the plaint schedule item No.2 in favour of the 3rd defendant is voidable.

6(ii) Per contra, the learned counsel for the respondents would contend that as per Section 359 of the Mahomedan Law, (a) The fateher; (b) the executor appointed by the father's will; (c) The father's father; (d) the executor appointed by the will of the father's father; are entitled in the said order to be a guardian of the property of a minor and that the mother was appointed as guardian of the minor by the grand-father of the minor (father's father) and hence, the sale deed executed by the mother under Ex.B.1 in respect of suit item No.2 in favour of the 3rd defendant cannot be held to a void document. For this contention of respondents' counsel, the counsel for the appellant would reply that as per section 359 of the Mahomedan Law, only the fater and in his absence, the executor appointed by the father's will or in his absence the father's father and fourthly executor appointed by the will of the father's father, can be a legal guardian and in this case father's father has not executed any will appointing the mother of the minor as legal guardian, but he has only executed a settlement deed Ex.B.1 wherein he has appointed the mother as a guardian. But this contention of the learned counsel for the appellant in my opinion cannot be sustainable because there is not much difference between the appointment of the mother by the grand-father under a will and the appointment of the mother as a guardian under a settlement deed. The only difference between the Will and the settlement deed is that 'Will' will come into force only after the death of the attestor whereas the settlement deed will come into effect immediately.

6(iii) The learned counsel appearing for the appellant would contend that there is no substantial questions of law involved in this second appeal and hence, the second appeal is to be dismissed on that score. For this proposition of law, the learned counsel relied on a decision reported in 2004 (1) Supreme Court Cases 271 (Md.Mohammad Ali (dead) by LRs. Vs. Jagadish Kalita and others). The facts in brief in the said case are as follows:

> "One S, original owner of the suit premises, transferred the same to G and K, two brothers. The structures standing of the suit land, being Holdings Nos.522 and 523 of the Municipality were divided into half and half. P, son of G allegedly amalgamated both the said holdings and got them registered in his name as Holding No.121. Holding No.522 was sold and a portion of Holding No.523 was leased out to Respondent 3 by P. On death of S, his sons got the lands mutated in their favour in terms of an order of the SDO of the Municipality. The LRs of K (Defendants 7, 8 and 9) transferred their possessory rights in Holding No.523 to the appellant by a registered deed. Later, the

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LRs of S Defendants 10, 11 and 12) transferred their rights, title and interest in Holding No.523 to the appellant. Thereafter, the appellant called upon Respondent 3 to pay rent to him which was denied. The appellant filed a money suit for recovery of arrears of rent but the same was dismissed. The appellant then filed another suit praying for a decree for declaration of his right, title and interest over the property, ejectment of Respondent 3 and precept to the Municipality for mutating his name on Holding No.121. In the said suit Defendants 1 to 3, 5 and 6 were LRs of P, Defendant 4 is Respondent 3, Defendants 7 to 9 were LRs of K and Defendants 10 to 12 were LRs of S. In that suit the contesting respondents herein inter alia raised a plea of adverse possession on the ground that they and their predecessors-in-interest had their peaceful and uninterrupted possession for more than 40 years, adversely to the interest of Defendants 10, 11, 12 and their predecessors-in-interest. They further set up a plea that the suit property was not actually partitioned between G and K nor was separate physical possession thereof effected and in fact G and K orally gifted the plot to P and since then he had been in exclusive and peaceful possession as owner. The trial Court decreed the suit. But the first appellate court held that the appellant had failed to prove the factum of oral gift. It was, however, observed that some sort of mutual arrangement might have taken place. The first appellate court furthermore held that the burden lay heavily on the plaintiff to prove his title and possession within 12 years since before the date of filing of the suit but he failed to prove the same and as such the suit was hit by Article 65 of the Limitation Act. The High Court dismissed the second appeal. Before the Supreme Court the appellant filed copies of the plaint and the written statement pursuant to the Court's order so as to enable it to decide whether the plea of adverse possession taken by the respondent is sustainable. On behalf of the appellant it was submitted that the parties admittedly had been co-sharers, the first appellate court as also the High Court have committed a manifest error in dismissing the suit holding that the respondents perfected their title by adverse possession, although the contesting respondents neither raised any plea nor proved ouster of other co-sharers.

Allowing the appeal the Honourable Supreme Court held that the respondents in their written statement raised a plea of adverse possession only against the third set of the defendants. A plea of adverse possession set up by the respondents does not meet the requirements of law also in proving ouster of a co-sharer. But in the event the heirs and LRs of G and K partitioned their properties by metes and bounds, they would cease to be co-sharers in which event a plea of adverse possession as contradistinguished from the plea of ouster could be raised. The respondents have failed to raise any plea of

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ouster. No finding has been arrived at by the High Court as to from which date they began to possess adversely against the plaintiff or his predecessors-in-interest. Mere non-payment of rents and taxes may be one of the factors for proving adverse possession but cannot be said to be the sole factor. The High Court has not assigned any reason as to how there had been a open ouster by P. Furthermore, the first appellate Court applied a wrong principle of law in relation to interpretation of Article 65 of the Limitation Act, 1963. The High Court fell into the same error. In the facts of the present case the question of the respondents acquiring title by ouster of the appellant on the basis of the order of the municipal authorities in the mutation proceedings does not arise. In the suit the only issue which could be raised and determined was as to whether Respondent 3 was a tenant of the plaintiff. As the plaintiff or his predecessors-in-interest failed to show that Respondent 3 was inducted by them, his claim for arrears of rent was rejected but the Court while determining the said issue could not have gone into a pure question of title as well as the question as to whether the respondents herein acquired title by adverse possession.

The High Court while determining the question should have formulated substantial questions of law in terms of Section 100 of the Code of Civil Procedure, 1908. In absence of formulation of such substantial questions of law, probably the High Court committed the errors.

In the case on hand, the question of law to the effect whether to set aside the sale transaction Ex.B.1 is barred by limitation has been framed, even though there is no substantial question of law whether the defendants have prescribed title by way of adverse possession has been farmed. Since there is no relevant substantial question regarding prescription of title by way of adverse possession by the defendant has been framed before this Court, this Court is of the opinion that once the sale deed executed by the mother under Ex.B.1 is held valid then, the question of law of prescription of title by adverse possession in respect of the suit property by the defendants dose not arise at all for consideration. So, the ratio laid down in the above said dictum will not applicable to the present facts of the case.

6(iv) The learned counsel for the appellant relied on the decision reported in AIR 1975 PUNJAB & HARYANA 198 (Anant Ram Vs. The State of Punjab) and contended that in the second appeal the parties are not entitled to challenge the findings of the Courts below regarding the date of birth of the appellant once it has been decided on the basis of oral and documentary evidence. The trial Court relying on Ex.A.2 has come to the conclusion that on the date of filing of the suit the plaintiff was aged only 19 years one month and 14 days and hence, before attaining majority of 21 years of age the suit has been filed by the plaintiff and hence it cannot be said that the suit is barred by limitation. But it is pertinent to note that Ex.A.2 is a transfer certificate issued by School relating to one Akbar. It is not stated in Ex.A.2 that it relates to

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Mohideen @ Akbar, but the plaintiff has mentioned his name in the cause title to the plaint as Mohideen @ Akbar. The plaintiff, to show his age on the date of filing of the suit has not filed his birth certificate. It has been categorically held in the above said dictum as follows:-

> "The entries in the school register and transfer certificate of a school which is not a Government or State School are not admissible under Section 35. Evidence Act, as an employee of that school is not a public servant as defined under Section 21(9). Penal Code, and entries in registers made by him are not made in public or official registers. The fact that in practice generally lesser age is given during admission in schools must be taken into consideration by the Court and such entries in school registers cannot be made the basis for any conclusion.
>
> In the above dictum AIR 1940 Rang 191, (1968)70 Pun LR (SN) 31, AIR 1936 Lah 598, (1969(71 Pun LR (SN) 21 and AIR 1965 SC 282 were followed and AIR 1959 SC 57 and AIR 1963 SC 302 referred.

However, the author of EX.A.2 was also not examined as a witness to prove Ex.A.2. The first appellate Court in its judgment at para 13 has given reasoning for rejecting Ex.A.2-transfer certificate on the ground that the age of the person can be ascertained only from birth certificate and not on the basis of a school transfer certificate, relying on a decision reported in AIR 1970 SC 1020. The plaintiff in his cross-examination has also admitted that only at the age of 5 he was admitted in the first standard and that he has filed the suit in the year 1989. If the plaintiff would have joined in the first standard at the age of 5 years then at the time of leaving the school on 5.1.1981 he would be 12 years of age studying in 7th standard. He has filed the suit in the year 1987. But as per Ex.A.2 has was 14 years of age while studying 7th standard in the year 1981. So at the time when he filed the suit he must be not less than 21 years of age. There is no birth certificate produced to show the exact age of the plaintiff. So as rightly held by the first appellate Court the suit was also not filed within three years from the date of attaining majority of the plaintiff.

6(v) The learned counsel for the appellant relying on 1996(7) Supreme Court Cases 436 (Meethiyan Sidhiqu Vs. Muhammed Kunju Pareeth Kutty and others), contended that the sale deed executed by the mother on behalf of the minor Mohideen is not valid and it is to be construed as a void document. Even in the said dictum at para 5 the Honourable Apex Court has held as follows:-

> "Mulla's Principles of the Mohammadan Law (19th Edn.) by Justice M.Hidayatullah, former Chief Justice of this Court and Arshad Hidayatullah, deals with legal property guardians of a Muslim minor in Section 359. In the order, only father, executor appointed by the father's will, father's father and the executor appointed by the will of the father's father are legal guardians of property. No other relation is entitled to be the guardian of the property of a minor as of right; not even the

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mother, brother or uncle but the father or the paternal grandfather of the minor may appoint the mother, brother or uncle or any other person as his executor or executrix of his will in which case they become legal guardian and have all the powers of the legal guardian as defined in Sections 362 and 366 of the above Principles. The Court may also appoint any one of them as guardian of the property of the minor in which case they will have all the powers of a guardian appointed by the court, as stated in Sections 363 to 367."

I am of the opinion that mother appointed by the paternal grand-father (father's father) under Ex.B.1-settlement deed is also competent to be a legal guardian as defined under Section 359 of Mahomaden Law in respect of the properties of a minor. Even as per Ex.B.1-sale deed, the plaintiff-Mohideen was aged 7 years in the 1973. After a lapse of 14 years from the date of execution of Ex.B.1, the plaintiff has field the suit in the year 1987 at the age of 21years. This itself will clearly go to show that the age mentioned in Ex.A.2 will not be a correct one, because he ought to have been born in the year 1966 itself whereas in Ex.A.2 it is stated that he was born in the year 1968. Under such circumstances, I do not find any illegality or infirmity in the findings of the learned Subordinate Judge in A.S.No.244/1994 on the file of Subordinate Court, Villupuram. Apart from the reasoning given in the judgment in A.S.No.244/1994 this Court is of the view that the sale deed executed by the mother of the plaintiff under Ex.B.1 is valid under law as per Section 359 of the Mahomedan Law since she has been appointed as legal guardian by the father's father of the minor under Ex.A.1-settlement deed. Point is answered accordingly.

7. In the result, the appeal is dismissed with costs throughout confirming the decree and judgment in A.S.No.244/1994 on the file of the Subordinate Judge, Villupuram.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

sg/ssv

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To
1. The Subordinate Judge,
Villupuram.

2.The Addl. District Munsif,
Kallakurichi.

3. The Section Officer, VR Section,
High Court, Madras.

Second Appeal No.184 of 1997

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